IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

RAUL ARCHULETA, ISAAC MARTINEZ, TRINA SUAZO-MARTINEZ, DANIEL FRANK, MICHELLE CORIZ, ADRIANNA MARTINEZ, VALLERIE LAMBERT, and SAM SPROW,

Plaintiffs,

vs. CV-21-1030 KWR

TRIAD NATIONAL SECURITY, LLC, d/b/a LOS ALAMOS NATIONAL LABORATORY, and THOMAS MASON, Director of Los Alamos National Laboratory, in his official capacity,

Defendants.

TRANSCRIPT OF PROCEEDINGS, VIA ZOOM
PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION
BEFORE THE HONORABLE KEA W. RIGGS
UNITED STATES DISTRICT JUDGE
FRIDAY, OCTOBER 29, 2021, 9:01 A.M.
ALBUQUERQUE, NEW MEXICO

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I N D E X

PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION
VIA ZOOM

(Court in session at 9:01 a.m.)

THE COURT: Good morning.

We are here this morning in the case of Archuleta, Martinez, et al., v. Triad National Security, L.L.C., doing business as Los Alamos National Laboratory, 21-CV-1030. We are here for a motion for temporary restraining order and preliminary injunction, along with a motion to compel arbitration.

That being said, would counsel for the plaintiffs identify yourself for the record, please?

MR. ARTUSO: Good morning, Your Honor. Angelo Artuso on behalf of the plaintiffs.

THE COURT: Good morning, Mr. Artuso.

Counsel for defendants?

MS. SANCHEZ: Good morning, Your Honor. Sara Sanchez on behalf of defendants Triad National Security, L.L.C., and Dr. Thomas Mason. And with me this morning are Michael Weil and Cullen Wallace.

THE COURT: Thank you. We are having a little bit of feedback this morning because there are so many people on Zoom, I believe. If you are not speaking, please place your screen on mute so that the feedback will be minimized.

Now, before we get started, I have set this matter for two and a half hours this morning. We are not going to go past 11:30. That gives each of you just a little more than an hour to discuss this case with the Court. I can tell you that the Court has reviewed all of the pleadings in this matter, and we are ready to proceed.

It appears that the motion for a TRO and preliminary injunction and the motion to compel are inextricably intertwined, and so we are going to be discussing both of them this morning, if you would do that, while you are addressing the Court. The Court would appreciate that.

That being said, Mr. Artuso, are you ready to proceed?

MR. ARTUSO: I am, Your Honor.

THE COURT: All right. Thank you. We're getting a little feedback still. Do we know where that's coming from?

MR. ARTUSO: I suspect, Your Honor, that when I speak, it plays over my speaker when it gets to the Court, but I don't know how to reduce that.

THE COURT: I don't think it's just you, Mr. Artuso, so we will do the best that we can.

Mr. Artuso, you may proceed, sir.

MR. ARTUSO: Yes, Your Honor. Thank you. May it please the Court.

I will first address the motion to compel arbitration. We did file a response brief yesterday afternoon, and essentially our argument with respect to the motion to compel arbitration is that the arbitration provisions in the employment agreements do not apply to plaintiffs' claims.

We cited Mathews v. Denver Newspaper Agency LLP, a Tenth Circuit case from 2011, 649 F.3d 1199. And in that case, the Tenth Circuit held, "As the law now stands, both individual employees and unions may prospectively agree with the employer to arbitrate all employment-related disputes, including statutory rights normally enforced through litigation, but only so long as this intention is clearly expressed."

The intention to litigate statutory rights claims such as Title VII claims, or constitutional rights claims such as infringement on the free exercise of religion or equal protection under the law, are not clearly expressed in the arbitration provision that is provided in the employment agreements that are attached as exhibits to Los Alamos' motion to compel arbitration. And we provided cites in our response brief as to where the Court can find those.

Under New Mexico law, Your Honor, there have been a few cases holding that arbitration clauses in at-will agreement contracts are not enforceable because they lack consideration. And we cited the Piano v. Premier Distributing Co. case, which is at 137 New Mexico 57. In that case, the New Mexico Court of Appeals noted as follows: "Defendant argues that in exchange for Plaintiff's promise to submit her disputes to binding arbitration it allowed her to retain her job. However, Plaintiff was an at-will employee before she signed the Arbitration Agreement and she remained an at-will employee after she signed the Arbitration Agreement. The implied promise of continued at-will employment placed no constraints on Defendant's future conduct; its decision to continue Plaintiff's at-will employment was entirely discretionary. Therefore, this promise was illusory and not consideration for Plaintiff's promise to submit her claims to arbitration." And I cited a couple of other cases, Your Honor.

The same set of facts apply here. As we pointed out to the Court in our response brief, six of the eight plaintiffs were working at Los Alamos National Labs before Triad was awarded the contract and required plaintiffs to sign new contracts. They were at-will

before, and they remained at-will. So the contract is not supported by consideration.

We also cited to the Court Heye -- I believe I'm pronouncing that correctly, H-E-Y-E -- v. American Golf Corporation, a 2003 case from the New Mexico Court of Appeals, at 134 New Mexico 558. It reached the same result, saying that an arbitration agreement which has been placed into the employer's employee handbook was not enforceable because the employee was an at-will employee, and the employer remained free to change his handbook any time it wished.

The arbitration provision is also not enforceable under New Mexico law. In our response brief, Your Honor, we cited to the New Mexico Uniform Arbitration Act, which is at 44-7A-1 and following. And under Section 44-7A-5 of the New Mexico Statutes, it provides in relevant part that, "In the arbitration of a dispute between an employee and another party, a disabling civil dispute clause contained in a document relevant to the dispute is unenforceable against and voidable by the employee. Section 44-7A-1(b)(4)(f) defines a disabling civil dispute clause as a provision modifying or limiting procedural rights necessary or useful to an employee in the enforcement of substantive rights against a party drafting a standard form contract

such as, by way of example, a clause requiring the employee to decline to participate in a class action."

Each of the arbitration provisions for each of the plaintiff's employment agreements require that the employees do not bring a class action lawsuit. As such, it's a disabling civil dispute clause not enforceable under New Mexico law.

We also cited to the Court Fiser v. Dell Computer Corp., a 2008 New Mexico Supreme Court case, at 144 New Mexico 464. In that case, the Court held that the arbitration provision was unconscionable and held, "Because our invalidation of the ban on class relief rests on the doctrine of unconscionability, a doctrine that exists for the revocation of any contract, the FAA" -- the Federal Arbitration Act -- "does not preempt our holding. When a provision of a contract is determined to be unconscionable, we may refuse to enforce the contract or we may enforce the remainder of the contract without the unconscionable clause, or we may limit the application of any unconscionable clause to avoid any unconscionable result. Here, the class action ban is a part of the arbitration provision and is central to the mechanism for resolving the dispute between the parties; therefore, it cannot be severed. We decline to enforce the arbitration provision."

Respectfully, Your Honor, I would submit that the Court should reach the same conclusion here, that under New Mexico law, the inclusion of a ban on class action lawsuits makes the arbitration provision unlawful under the statute, and the New Mexico Supreme Court has concluded that the inclusion of that class action provision makes the contract unconscionable and unenforceable.

Finally, Your Honor, even if the Court were to find that the question of arbitration cannot be finally decided today, the fact that there is an arbitration request pending does not prevent the Court from issuing injunctive relief.

And in our response brief, we cited three cases to the Court. Teradyne, Inc. v. Mostek Corp., which is out of the First Circuit, 1986, 797 F.2d 43: "A district court can grant injunctive relief in an arbitrable dispute pending arbitration, provided the prerequisites for injunctive relief are satisfied."

The same result was essentially reached by the Seventh Circuit in Sauer-Getriebe KG v. White Hydraulics, Inc., 715 F.2d 348. In that case, the Court of Appeals for the Seventh Circuit reversed the district court's denial of injunctive relief pending arbitration.

And the same result was reached by the Fourth Circuit in Merrill Lynch, Pierce, Fenner & Smit, Inc. V. Bradley, a 1985 case, at 756 F.2d 1048. In that case, the Court of Appeals affirmed the district court's grant of a preliminary injunction pending arbitration. And then finally, Your Honor, I would point out that the arbitration provision calls for the use of the rules of the Triple A, the American Arbitration Association. Those rules, themselves, allow for injunctive or interim relief pending arbitration.

Their rules and mediation procedures, Rule 32, provides, "A request for interim measures addressed by a party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate or a waiver of the right to arbitrate."

Based on these arguments and facts, Your Honor, and the authorities that we've cited, we respectfully submit that the motion to compel arbitration should be denied.

To move on to the motion for TRO and preliminary injunction, as the Court is aware, we need to prove -- as plaintiffs, we need to prove four things in order to be entitled to a TRO or injunction: That we are likely to succeed on the merits of one or more of our claims; that the plaintiffs will suffer irreparable

harm in the event that an injunction does not issue; that the balance of equities or the balance of harm tips in favor of issuing the injunction; and that issuing the injunction is not contrary to public policy.

As both parties, I think, agree, one of the primary reasons for a TRO and a preliminary injunction is to preserve the status quo that existed before the litigation. Actually it's a little bit broader than that.

The Tenth Circuit in 2004, en banc, in the case of O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft -- I'll just refer to it as the O Centro case, Your Honor -- at 389 F.3d 973, held that the status quo ante is defined as "the last peaceable uncontested status existing between the parties before the dispute developed."

In this instance, the last peaceable uncontested status between the parties was when plaintiffs received their full salary and benefits. Even if as of the date of this lawsuit, which was I believe October 22nd, plaintiffs continued to receive their full salary and benefits because they were all on vacation -- they had not been placed on leave without pay; none of them had. And therefore, the status quo ante, the last peaceable uncontested status, is that

they're working, and that they have their benefits, and that they were being reasonably accommodated by the Labs by either being allowed to work from home or by being masked, social distancing, and taking occasional tests that tested positive for COVID-19. So even if defendants are perfected, somehow the October 15th deadline passing somehow altered the stance of this case, the fact is that the status quo ante is working and getting paid and having your benefits.

The facts in this case are pretty straightforward, I believe, Your Honor. All of the plaintiffs work for Los Alamos National Labs. All of the plaintiffs have been granted a religious exemption. In other words, the Labs have conceded, admitted, and do not dispute that each of the plaintiffs has a sincerely-held religious belief that prevents them from taking the COVID-19 vaccine. Some of the plaintiffs have also applied for a medical exemption on the basis that they had COVID, they survived, and they have natural immunity. And it is our contention that natural immunity is far more robust and comprehensive than the immunity that would be granted by a vaccine.

Despite granting all of the plaintiffs' religious exemptions, the Labs has taken the position that the only accommodation for every employee granted a

religious exemption is: First, you take your vacation time if you have any; once you've used that up, you could be terminated by the Labs, no guarantee that you'll have a job; and then you go on an indefinite leave without pay.

This accommodation is in stark contrast, startling sharp contrast, to the accommodations given to medically exempt employees. The Labs have refused to engage in an interactive dialogue with any of the plaintiffs granted this religious exemption. Instead, they issued a blanket leave without pay policy. That's the only accommodation they will offer to the religiously exempt.

But the medically exempt have, in fact, been accommodated. The Labs have engaged in an interactive dialogue with them. The medically exempt are allowed to continue working, both on-site or off-site, whether by phone, or remotely, or by computer at home, or on-site by following the preexisting protocols of masking, social distancing, and occasional COVID testing.

Based on the way in which religiously exempt plaintiffs and others are being treated, we have submitted or asserted claims, the following claims:

First: That the Labs' policies infringe on the plaintiffs' right to the free exercise of their

religion under the First Amendment.

Second: That the Labs' policies infringe on the plaintiffs' right to equal protection under the law under the Fourteenth Amendment.

Third: That the defendants' actions violate Title VII of the 1964 Civil Rights Act, in that they have failed to provide reasonable accommodation, have failed to engage in an interactive dialogue about accommodations, and have engaged in a retaliation against the religiously exempt employees by offering a very punitive leave without pay policy.

And, finally, we have asserted claims under the Americans with Disabilities Act, where those plaintiffs who have natural immunity, based on the fact that studies indicate that those with natural immunity are at risk of a hyperimmuno-response, a hyperimmune system response, if they receive the vaccines. And frankly, I do not think that it is the place of the defendants, or anyone for that matter, to insist that the plaintiffs or others should take that chance. It's not up to them to make that decision. It's up to the individual to decide whether or not they want to take the risk of a hyperimmune response that could have serious consequences, life-long consequences if they should happen to be one of the few that have that

reaction to the vaccine.

I think it would be helpful, Your Honor, to just sort of briefly review who these plaintiffs are. There was a declaration attached for each of them to our motion for TRO.

I would like to briefly review the first plaintiff, Raul Archuleta. He has worked at the Labs for over 20 years, Your Honor. He is an ordained pastor at New Creation in Christ Ministry in Espanola, New Mexico. He has had COVID and recovered, so he has natural immunity, but his request for a medical exemption was denied. He has worked from home for over a year. He has not been required to be on-site at LANL for normal work activities during that year. His team at the Labs is expected to continue working remotely once the pandemic is over. In a request for a religious exemption, he asks to be allowed to continue working from home. That request was ignored.

After receiving his religious exemption, he asked for reconsideration of his request to continue working from home. That request was denied, and he was simply told, "The Lab is" -- quote -- "not differentiating accommodations for those teleworking versus those working on site." In other words, the Labs' position, we respectfully submit, is that: It

does not matter if you are not here on-site. It does not matter if you are not meeting with your co-workers. It does not matter if you have proven that you can successfully do your job at home, or remotely, using a computer and a phone. It does not matter that the Labs are not requiring guest scientists, contractors, subcontractors, and students who work off-site, they don't have to get the vaccine; but because you're an employee working off-site, you do. It doesn't matter if you have natural immunity to COVID. And it doesn't matter that we have allowed other medically exempt employees to keep their jobs by providing them with reasonable accommodations, including working from home.

The message that Mr. Archuleta and the other employees in this case have received so far from the defendants is: We recognize that you have a sincere religious belief and have granted you an exemption from the vaccine, but we don't like it.

Isaac Martinez, the second plaintiff. He has worked at the Labs for over 22 years. He's a life-long resident of the Los Alamos area. He has had COVID and recovered, so he has natural immunity. His request for medical exemption was also denied. After receiving his religious exemption, he sent an e-mail asking to talk about the leave without pay policy. The Labs did not

respond.

His wife, Trina Suazo-Martinez, has worked at the Labs for over seven years and, prior to the most recent time, worked there from 2002 to 2007, so 12 years in total. Isaac and Trina have four children, ages 11 to 21, the two oldest being in college. She is also a life-long resident of Los Alamos. She also has natural immunity to COVID. Since the Lab adopted its COVID protocols in April of 2020, Ms. Suazo-Martinez has not had an office on-site. She is part of the Lab's telework pilot project. She has been working from home for over 18 months with no problem. And she also, after receiving her religious exemption, sent an e-mail asking to talk to the Labs about the leave without pay issue and, again, received no response.

Adrianna Martinez. She has been employed at Los Alamos for over a year. She was hired during the COVID pandemic. She's married, with two children. She requested a medical exemption due to preexisting medical conditions that are unrelated to COVID, but were confirmed in writing by her doctor. The medical exemption request was denied. She also has natural immunity because she did have COVID.

Daniel Frank. He has been employed at the Labs for over 12 years. He's married and has two kids.

He has successfully worked almost entirely from home since April of 2020, and since April of this year has been part of the Labs' telework pilot project. He has had no need to be on-site except in rare circumstances like drug or COVID testing required by the Labs.

Michelle Coriz. She has been directly employed by the Labs since 2005, over 16 years. Before that, she worked there as a contractor for six years. She's married, with two children, and is the main provider for her family. She's an environmental management professional and works primarily on environmental compliance, and has accumulated a great deal of historic and institutional knowledge regarding environmental, nuclear, and waste issues at the Labs. She has been working from home and has offered to continue to do so. She has received no response from the Labs regarding her offer to continue working from home.

Sam Sprow. He began working as an intern at the Labs in 2019 and was offered an R&D engineer position in November of last year, which he has been working on. He was so excited to come to work for the Labs that he moved 1,000 miles away from home, family, and friends in Mississippi and left a master's degree program that he was pursuing.

And then finally, Vallerie Lambert. She has worked for the Labs for over five years. She's married, with two children in college, and is raising a grandson. She successfully worked from home from March 2020 to September 2021. She was recommended for a promotion, but after filing her request for a religious exemption was told by her manager that the promotion would probably not be approved because she was unvaccinated. She was told by managers that "it could all go away" if she just took the vaccine. She was also told that being allowed to continue working from home would be unfair to her co-workers.

And recently, last week, she lost the position with a higher salary because she may be placed on leave without pay, and the group that was advertising for the job said that they would have to resubmit or repost the job for employees who would not be on leave without pay. In other words, she lost a chance for a higher-paying job because of her religious exemption.

Now, one of the elements I've said, Your Honor, that we have to prove is irreparable harm. In this instance, I believe irreparable harm consists of the following:

First off, without an injunction, there will be a continued infringement of the plaintiffs'

constitutional right to the free exercise of their religion. Without an injunction, there will be a continued infringement of the plaintiffs' free exercise right -- I'm sorry -- of the plaintiffs' constitutional right to equal protection under the law.

In the Hobby Lobby Stores, Inc., the Sebelius case that we cited to the Court in our brief at 723 F.3d 1114, the Tenth Circuit stated, "In First Amendment cases, the likelihood of success on the merits will often be the determinative factor. That is because the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury. When a law is likely unconstitutional, the interests of those the government represents, such as voters, does not outweigh a plaintiff's interest in having its constitutional rights protected. It is always in the public interest to prevent the violation of a party's constitutional rights."

Your Honor, based on the holding in Hobby Lobby, should we prevail, should the Court determine that we are likely to succeed on either the First Amendment or Fourteenth Amendment claims, irreparable harm is established, as well as the other elements.

So with respect to our other claims, it has been recognized that irreparable harm can be present

when a computation of damages is either impossible or extremely difficult. In this instance, there are several harms currently being visited upon the plaintiffs, and they will continue to be visited upon the plaintiffs in the absence of an injunction.

First, there is the fear and anxiety that accompanies any uncertainty about a person's financial future, and I would point out that this is not a harm just to the plaintiffs, but to their families and minor children, as well.

There is psychological harm here, Your Honor, from being ostracized and exiled from communities in which some of these plaintiffs have worked for over 20 years. They are being excluded. They are being told that they're not welcome because of their religious beliefs. They run the risk of losing professional relationships. They run the risk of damage to their reputation.

There are harms that are difficult to compute, such as a lost chance. Plaintiffs, if they don't get injunctive relief, will lose the chance to compete for merit raises, performance bonuses, and promotions. Now, there's no guarantee that they would ever receive any of those things. But the harm, the irreparable harm, consists of the fact that they're not even allowed to

compete for them.

There is irreparable harm in the loss of future pension and lifetime health insurance benefits. For a couple of these plaintiffs, lifetime health insurance benefits were just a couple of years away from vesting.

There is irreparable harm in the loss of their current health insurance. There's no guarantee that any replacement policy will cover a preexisting condition. And in at least one plaintiff's case, they are currently undergoing diagnosis and testing and possible treatment for a serious condition. That may be interrupted by the loss of their health insurance.

There is irreparable harm in the loss of security clearances, Your Honor, in the event -- and eventually it will happen if they remain on leave without pay. These plaintiffs will lose their security clearances. There is no guarantee that they'll ever get them back. And, moreover, when they apply for jobs with a lot of defense contractors or Department of Energy contractors, there is a question, usually on the job application, about whether you have ever held a security clearance, whether you have ever lost a clearance, or had a clearance revoked. Answering that question alone could be sufficient for the employer not to decide to

interview one of the plaintiffs. That's an irreparable harm.

Now, in order for the constitutional claim to be established, Your Honor, the Court will have to find that the defendants are government actors. We cited several cases in our brief. I would like to briefly review some of the legal holdings that are before the Court today.

In Wittner v. Banner Health, 720 F.3d 770, a Tenth Circuit case out of 2013, the Court held, "A public-private relationship can transcend that of mere client and contractor if the private and public actors have sufficiently commingled their responsibilities."

In Gallagher v. Neil Young Freedom Concert, 49 F.3d 1442, a Tenth Circuit case from 1995, the Court held that if the government "has so far insinuated itself into a position of interdependence with a private party that it must be recognized as a joint participant in the challenged activity," it can be found that the private party is a government actor.

The Supreme Court in 1995, in Lebron v. National Railroad Passenger Corporation, found that Amtrak was a state actor despite a federal statute that declared that it was not part of the federal government. The Court held, "That Government-created and -controlled

corporations are (for many purposes at least) part of the Government itself has a strong basis, not merely in past practice and understanding, but in reason itself. It surely cannot be that government, state or federal, is able to evade the most solemn obligations imposed in the Constitution by simply resorting to the corporate form."

And that is what we have here, Your Honor. The defendants will argue that they are not government actors because they've created a separate entity, an L.L.C., an entity that is composed of three equal members, two of whom are state institutions, the University of California Regents, the Texas A&M University System, and Battelle Memorial Institute.

The Labs are subject to extreme regulation. There are a multitude of statutes and regulations from the federal government that govern every aspect of their activity. They are under the control of the NNSA, the National Nuclear Security Administration, a division of the Department of Energy. In fact, Your Honor, if you look at the approval of religious exemption which was attached to the declarations of each of the plaintiffs, and that's Document 5 and the exhibits attached to Document 5, you'll note something interesting. At the top of each approval is the Los Alamos National

Laboratory's logo, and at the bottom of each approval is the logo of NNSA, the National Nuclear Security Administration. That approval doesn't appear to come from Triad. It appears to come from the government.

The Labs are certainly not shy about using the imprimatur of the government when it suits their purposes, and the same is true of the forms that each of the plaintiffs had to fill out to request a religious exemption and to request a medical exemption. Those are also included in some of the plaintiffs' declarations as attachments.

And, again, it is the Labs' logo that appears at the top, and the Court would be hard pressed to find, without looking carefully, anything on those forms that says "Triad, L.L.C."

The Supreme Court has held that a nominally private actor becomes a governmental actor when there exists, "Such a close nexus between the State and the challenged action that seemingly private behavior may be fairly treated as that of the State itself." And that was in Brentwood Academy v. Tennessee Secondary Schools Athletic Association, 531 U.S. 288 at 295, a 2001 case.

I find it incongruous, Your Honor, that a school athletic association and Amtrak could be found to be government actors, and the company managing a

national nuclear laboratory would not be found to be a government actor. There are no private companies that have unfettered access to nuclear weapons. There are no private companies that are charged with the responsibility of enhancing the security and the safety of nuclear weapons. That is a function which is uniquely entrusted to the government. And therefore, I don't see how they can avoid being held as a government actor under such circumstances.

Additional indicia that they are government actors includes the fact that the vast majority of their funding comes from the government. In fact, Triad has been paid over ten billion dollars since it won the contract in 2018. All of the employees have to pass a national background check. Most of the employees have to receive a national security clearance. As I pointed out, they are heavily regulated. All of their work is reviewed and controlled by the government.

Again, in the Brentwood Academy case, the Court outlined some -- I'm sorry. In a case we cited to the Court, Villegas v. Gilroy Garlic Festival Association, the Court came up with some additional criteria for determining when a private party will be found to be a government actor, stating that a nominally private party is driven by facts which show that any

expressly private characterization in statutory law or the failure of the law to acknowledge that they are inseparable from the government or government agencies. Some of the factors to consider are:

"(1) the organization is mostly comprised of state institutions." Well, here, Triad is composed of two state institutions.

"(2) state officials dominate decision making of the organization." Here, decision making at LANL is dominated by NNSA. The Labs and Triad are not going to do anything that the government tells them they shouldn't be doing.

"(3) the organization's funds are largely generated by the state institutions." Well, in this instance, the organization's funds are generated largely by the federal government.

"(4) The organization is acting in lieu of a traditional state actor." And here, as I pointed out, the Labs are acting with respect to enhancing the safety and security of nuclear weapons, an activity that is uniquely entrusted to a government actor.

In the case of Cherry Cotton Mills, Inc. v. United States, which we cited to the Court, in 1946, the Supreme Court, at 327 U.S. 536, 539, held, "That the Congress chose to call it a corporation does not alter

its characteristics so as to make it something other than what it actually is, an agency selected by Government to accomplish purely governmental purposes." And that was discussing the Reconstruction Finance Corporation.

In light of all the circumstances that I've just discussed, Your Honor, we firmly believe that the defendants in this case are state actors and, as such, their infringement of the plaintiffs' constitutional rights are actionable and constitute irreparable harm.

It is undisputed in this matter so far, Your Honor, that the defendants are treating religion differently. As I pointed out, the only accommodation offered, without discussion with any of the plaintiffs or anyone else granted religious exemption, is: You get to take leave without pay. You may lose your job after you've used up your vacation time. You lose all of your benefits.

We highlighted in our brief some of the announcements made by Defendant Mason related to this vaccine. On August 23rd, the same day, the exact same day that President Biden announced that the FDA had approved Pfizer's Comirnaty vaccine and called on business leaders to impose vaccine mandates, that day Defendant Mason issued a vaccine mandate for Los Alamos

employees and said it was necessary because of the "rising COVID-19 case rates in northern New Mexico and beyond," and that was based on three unvaccinated employees of the Los Alamos National Labs workforce having been hospitalized during the recent COVID surge. As we pointed out in our brief, Los Alamos has over 10,000 employees, but three employees being hospitalized was sufficient to cause Director Mason to issue a vaccine mandate.

Now, what's missing from his announcement is, there's no discussion as to whether those employees were hospitalized because they had COVID, or if they were hospitalized for some other reason and when they got to the hospital they tested positive for COVID. As I'm sure the Court knows, there has been some discussion over the last 18 months about the accuracy of the reporting. You may be hospitalized with some other condition, a heart condition, chronic obstructive pulmonary disease -- who knows? -- and you just happen to have COVID. You may actually die, but there is no distinction in the reports, or at least not that I've been able to see, between dying from COVID and dying with COVID. And those are two very distinct things, and they are not distinguished in Director Mason's announcement on August the 23rd.

On September the 9th, President Biden issued his executive order mandating that all federal employees be vaccinated. On September the 13th, Director Mason issued a new directive on medical and religious exemption, and that directive stated, "If a medical exemption is granted, the Laboratory will put in place mitigations that will protect the health and safety of the entire workforce consistent with our obligations under the Americans with Disabilities Act."

Religious exemptions, however, are to be handled differently.

"If a religious exemption is granted, the Laboratory will determine if the exemption can be reasonably accommodated while still protecting the health and safety of the rest of the workforce. However, if the Laboratory has not found an acceptable accommodation by October 15, unvaccinated employees with religious exemptions may be placed on unpaid leave or may use vacation leave until an accommodation that will not unduly burden the Laboratory or other employees has been identified."

The question I have is: If this was such an urgent and compelling issue for the Lab, why did they choose to wait 25 days, from September 20th until October 15th, before implementing this leave without pay

policy and telling religiously exempt employees, "We no longer need your services at the moment because you refuse to get vaccinated"?

What was it about October 15th that was the magic date, that suddenly, you know, prior to that time: We're going to proceed under this protocol; but once we hit October 15th, we can no longer accept the risk? Especially when the Court considers that the August 23rd announcement was made in large part citing to three employees having been hospitalized during the recent surge, and highlighting a surge in COVID cases in northern New Mexico.

Since August 23rd, the rate of COVID cases has declined; and yet, that doesn't ever seem to enter into the Lab's analysis, as it approached the October 15th date, of whether or not it could offer reasonable accommodations to plaintiffs and other religiously exempt employees.

On September 20th, Director Mason issued an updated directive saying about 1,000 employees and contractors have gotten the vaccine since he first made the announcement on August 23rd; a small number of medical exemptions have been granted; and the Lab is "working to put in place appropriate accommodations," as required under the Americans with Disabilities Act.

And then he says, "a larger number of religious exemption requests" -- have been submitted, and then says, "I have made the decision that the only accommodation the Laboratory can provide at this time for those granted religious exemptions is to take vacation or Leave without Pay effective October 15."

In a frequently asked questions publication by the Labs on September 27, 2021, the question was asked, "Can the same appropriate accommodations that will be put in place for an employee with a medical exemption be put in place for an employee with a religious exemption?"

The answer, "No. Medical exemptions fall under different rules and laws than religious exemptions."

You will note, Your Honor, that the reason for that decision is not: "Religious exemptions present different challenges, or religious exemptions present problems that we haven't figured out a way to work around."

It is, "We're not required to do anything different under the law; whereas, for medically exempt people, we have to."

I would submit respectfully, Your Honor, that there is no doubt, based on the announcements by the

Labs and the Labs' actions, that they are treating religion differently than they are treating similar employees who receive a medical exemption.

Plaintiffs submit that they are likely to prevail on their free exercise claim, Your Honor, the infringement of their right to free exercise of religion under the First Amendment.

As we noted in our brief, in Tandon v. Newsom, a recent case, April of 2021, from the U.S. Supreme Court, at 141 Supreme Court 1294, the Court held that, "Whether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue," including activities that "could present similar risks of spreading COVID-19."

In Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, the Supreme Court in 1993 held that, "a law which visits gratuitous restrictions on religious conduct...seeks not to effectuate the stated governmental interests, but to suppress the conduct because of its religious motivation."

If the defendants are found to be government actors, and if they are found that we have a likelihood of prevailing on the free exercise claim and the equal protection claim, then the defendants' actions are

subject to strict scrutiny. There is no way that under the facts currently before the Court they can pass that test. They cannot demonstrate that they have a compelling interest in treating religious employees differently than the medically exempt employees.

The restrictions are not neutral -- they do treat religious people differently than medical people -- nor are the restrictions generally applicable, because the instructions imposed by the Labs are not narrowly tailored, nor the least restrictive means to accomplish their goal of reducing COVID infections among their workforce.

They cannot withstand strict scrutiny, particularly when the Court considers factors such as many of the plaintiffs have been successfully working from home for 18 months.

In fact, one of the factoids that we cited to the Court in our brief was that according to an article published in January of 2021, 85 percent of the Lab was working remotely at that point in time; 85 percent of the employees were working remotely.

And despite that, the NNSA granted Triad a ten million dollar bonus for its work at the Labs in 2020, finding that the Lab management had been "very good."

This clearly demonstrates objectively that the Labs are fully capable of functioning and operating even when the vast majority of their workforce is not on-site. It also demonstrates that the prior protocols of masking, social distancing, and periodic testing are effective in terms of protecting the Los Alamos National Labs workforce.

I believe that we are also likely to prevail, plaintiffs are likely to prevail on their equal protection claim.

In our brief, we cited Kitchen v. Herbert, a Tenth Circuit case, 2014, at 755 F.3d 1193, talking about classifications, which is one of the primary considerations when thinking about equal protection. In that case, the Court said, "If a classification impinges upon the exercise of a fundamental right, the Equal Protection Clause requires 'the State to demonstrate that its classification has been precisely tailored to serve a compelling governmental interest.'"

Well, as I've just argued, Your Honor, first, there's no compelling governmental interest in a one-size-fits-all leave without pay policy for the religiously exempt, while providing individual accommodation for the medically exempt. And, secondly, it impinges on a fundamental right; in this instance,

the free exercise of religion.

Based on that, those facts, I believe that plaintiffs are likely to prevail on their equal protection claim.

Plaintiffs are also likely to prevail on their Title VII claim. Title VII requires, and the defendants in this instance have recognized, plaintiffs have that sincerely held religious belief that prohibits them from taking the vaccine. So under Title VII, when that's recognized, defendants have a duty, a legal obligation, to provide a reasonable accommodation, and the only way around that is to show and establish and prove that the accommodations that are available will constitute an undue hardship.

Frankly, Your Honor, how can they do that, when so much of their workforce has been working remotely for a long period of time and doing so successfully?

They also have an obligation under Title VII, Your Honor, to engage in an interactive and real meaningful dialogue with the employees granted a religious exemption, to try and see what accommodations might be available. But that never happened here.

And finally, Your Honor, they have an obligation not to retaliate against employees who have

asserted a right to a religious accommodation. And although no discovery has been done in this case, one can't help but wonder if that blanket leave without pay policy isn't in some form or manner retaliation.

The third element in establishing the right to a TRO or an injunction, Your Honor, as you know, is the balancing of equities or the balancing of harms. Here, there is no real harm to the defendants. We're simply asking that the status quo ante be maintained or reinstated. Our clients were working for the Labs right up until October 15th, following the established protocols at that time, either working remotely from home, or masking and distancing and being tested occasionally.

And how does it harm the Labs at this point, right now, today, October 29th, two weeks later, to say, "We're being harmed because they haven't been vaccinated"? How can they present a danger to any co-worker if they're not even there, if they're working from home, and if the protocols have proven themselves to be successful, as they have, since they were first implemented in April of 2020?

Finally, the last element is that it's in the public interest to issue the injunction. Well, it's always in the public interest, Your Honor, to enforce,

protect, and defend constitutional rights for individuals. It's always in the public interest to enforce the anti-discrimination laws that have been passed by our country. It is always in the public interest to let someone work and keep their job and to provide for their families.

And that's all that we're really asking for at this point, Your Honor, is that this draconian, "You must take leave without pay one-size-fits-all policy, which we refer to as accommodation by termination," is no real accommodation; and that our clients, my clients, the plaintiffs, need this Court's protection in order to keep and defend their rights.

Now, in their response, the defendants raised the issue, essentially, of collateral estoppel. We haven't had time to file a reply, but basically there are four elements under New Mexico law. The case is Shovelin v. Central New Mexico Electric Co-op, 115 New Mexico 293. That's a New Mexico Supreme Court case from 1993, and they identified four elements that apply to collateral estoppel.

First. The party to be estopped was a party to the prior proceeding. And in this instance, the defendants are relying primarily on Butters, a case that was heard in the First Judicial District a couple weeks

ago. Well, the plaintiffs in this case were not parties in Butters. The defendants make some insinuation that they suspect or they think that somehow we have lied to them about whether plaintiffs were parties in this case.

Frankly, Your Honor, I'm not sure how they practice law in California. I suspect that's where that came from. But it is offensive. It's a borderline ethical violation, if you were to ask me. They specifically wrote to us and asked if any of the plaintiffs were parties in Butters, and we told them unequivocally, "No."

For them to make their suspicion representations to the Court, it lacks a good faith basis, and it just -- they make some other insinuations, that we never threatened to file a TRO until after the Butters case was decided. That's just wrong. In our October 11th letter that we sent them -- and Butters wasn't heard until the 15th and wasn't decided until the 18th -- we basically told them that if we were unable to reach an agreement, that we would have no choice but to file a federal lawsuit and to seek immediate injunctive relief. So their assertion that we waited, somehow, is also completely wrong.

They make a claim in their response, Your Honor, that they have to limit the religiously exempt to

leave without pay because there are so many of them. Well, there is nothing in Title VII that recognizes a numerical inconvenience defense that says, "You have to make reasonable accommodations for the employees, you have to discuss reasonable accommodations with the employees, unless there's too many of them." The law doesn't say that, and no court has ever held that.

They cite to the EEOC Guidance in their brief, in Footnote 11 on Page 29, and that guidance is somewhat instructive. For example, Article L.3: "How does an employer show that it would be an 'undue hardship' to accommodate an employee's request for religious accommodation?"

Answer: "Under Title VII, an employer should thoroughly consider all possible reasonable accommodations, including telework and reassignment. In many circumstances, it may be possible to accommodate those seeking reasonable accommodations for their religious beliefs, practices, or observances without imposing an undue hardship."

Later on, that guidance says: "An employer will need to assess undue hardship by considering the particular facts of each situation and will need to demonstrate how much cost or disruption the employee's proposed accommodation would involve. An employer

cannot rely on speculative hardships when faced with an employee's religious objection."

They also cite the Barrington v. United Airlines case, Your Honor, which was a case decided in Colorado, October 14, 2021, or at least a partial decision was rendered. That case is significantly different than the case here before the Court. In that case, it was found that: For the avoidance of any doubt, even if plaintiff's job is advertised, plaintiff will be allowed to return to her job, or to a comparable position in the event her job has been filled, at such time as United is able to implement a testing protocol in her location and work area.

In our case, no such guarantee or assurance has been offered to the plaintiffs. In fact, they've been told the exact opposite: Once you've used up your vacation, you may be terminated. We can't guarantee that you'll have a job.

The Court there in Barrington also noted that neither party had provided it with any authority concerning whether temporary but indefinite unpaid leave constitutes a reasonable accommodation under Title VII.

Moreover, in the Barrington case, United Airlines actually did undertake a genuine case-specific

investigation regarding accommodations, unlike the Labs in this instance, which has issued a blanket: All religiously exempt employees will be placed on leave without pay.

So that case, I submit, Your Honor, is really not much support for the defendants' position.

There are some cases, though, that I think offer some support for the plaintiffs' claim in this instance. Yesterday, in U.S. District Court for the District of Columbia, in the case of Church v. Biden, which is at 1:2021-CV-02815, issued a minute order in which they said, in part, "The Court orders Defendant to file a supplemental notice." In that case, the defendants said: We're not going to place people on leave without pay; we're not going to penalize them until this gets decided.

The Court said, "It is not clear to the Court that this Notice sufficiently addresses the Court's concern that the Plaintiffs will not be disciplined or terminated while briefing is completed pursuant to the extended schedule requested by Defendants. It therefore appears that Plaintiffs may be prejudiced by the proposed extended briefing schedule. Accordingly, the Court orders Defendants to file a supplemental notice by no later than October 29, 2021, at 12:00 p.m. indicating

whether or not they shall agree voluntarily that no plaintiff will be disciplined or terminated pending the Court's ruling on the TRO Motion. Absent such agreement, the Court shall order bifurcated briefing, requiring Defendants to file an expedited opposition to the TRO Motion (by no later than November 2, with a reply due by November 3) and to file their proposed motion to dismiss in accordance with the schedule discussed during the October 27, 2021, teleconference."

In other words, the Court there is requiring that they either agree that they're not going to punish the plaintiffs, or there will be an immediate TRO hearing.

In Sambrano v. United Airlines, a case in the United States District Court for the Northern District of Texas, on October 25, 2021, the Court there extended the temporary restraining order that had been issued on September 24, 2021, in order to give the parties time to complete their briefing on preliminary injunction and to attend a court-ordered mediation.

And then finally, in Jeffrey Bilyeu v. UT-Battelle, L.L.C., which is a case that's very close to the case here, Your Honor, it involved Oak Ridge National Laboratories, the Court issued a temporary restraining order --

THE COURT: Mr. Artuso, just one moment, please. All right, counsel. As you can probably hear, we are currently having a fire alarm.

MR. ARTUSO: Yes, ma'am.

THE COURT: It's very unexpected. If you could remain on the line until we can find out where we can go from here. The Court will note it started at 10:00. We're going to be in a brief recess while we determine what is going on. Thank you.

MR. ARTUSO: Yes, ma'am.

(Recess from 10:00 a.m. until 10:21 a.m.)

AA VINCENT ESPINOZA: Counsel, we're back in session. Sorry. We apologize for the fire alarm. But if everyone would like to come back, we're ready to resume.

THE COURT: All right, counsel. Thank you for your patience with us. We had a fire alarm and had to evacuate. We are back.

Mr. Artuso, you were right at an hour when we were unexpectedly interrupted. I would like for you to wrap up, if you could. I'll give you five minutes to wrap up, sir. I think you were about at the end of your argument. And then I may have a couple of questions for you before I let the defense proceed.

So please proceed, Mr. Artuso.

MR. ARTUSO: Yes, Your Honor. Thank you.

When we took the break, I was just going to discuss the decision that was issued on October 15, 2021, by the U.S. District Court for the Eastern District of Tennessee, Jeffrey Bilyeu v. UT-Battelle, L.L.C. Respectfully, I'll submit that case is on all fours with this case. It involves the Oak Ridge National Laboratories. Battelle Memorial Institute is a member of the UT-Battelle, L.L.C., just as it is a member of Triad in this case.

The Court notes in its order of October 15th that defendant granted plaintiffs an exemption and provided unpaid leave beginning October 16, 2021, as an accommodation.

That is the same set of facts which is present here. In its order, the Court says: The Court finds that issuing a TRO is necessary to avoid immediate and irreparable injury, loss, or damage to plaintiffs, citing as those irreparable harms: Plaintiffs presented evidence that indicates their claims have a substantial likelihood of success on the merits. They have adequately expressed they will suffer irreparable harm. In addition to a functional loss of employment, plaintiffs assert that they will suffer irreparable harm due to the possible loss of employment benefits, loss of

security clearances associated with their employment, and inability to pay for housing and education costs.

So that is directly in line with the irreparable harm that plaintiffs here contend they are suffering.

The partial grant of plaintiff's request, according to the Court in the Eastern District of Tennessee, inflicts minimal harm on the defendant UT-Battelle. The company was operating with plaintiffs and others receiving accommodations before this afternoon. Preventing their placement on unpaid leave for a matter of two weeks simply will not harm the defendants. That is also the case here.

And then, finally: The Court hereby enjoins from terminating or placing on indefinite unpaid leave any employee who has received a religious or medical exemption until such time as the preliminary injunction hearing can be held.

Finally, in closing, Your Honor, I would like to leave the Court with these thoughts. This case, like so many cases, is really more about people, I think, than wrangling over the law. Trina Suazo-Martinez, one of the plaintiffs, in Document 5-3, her declaration to the motion, at the very end provided this information. She says, "The emotional stress to my family arising

from this matter is impossible to quantify. It is hard for my 13-year-old son and 11-year-old daughter to understand suddenly mom and dad are losing their jobs because they are obeying God. Because of the economic uncertainty being created by LANL's policies we are having to prepare to sell our home with no assurance as to where we will move. This is very difficult for my children to understand and handle."

Adrianna Martinez, no relation, in her declaration, which is Exhibit 5-4, says, "My 13-year-old son's depression and anxiety have digressed since the uncertainty being created by LANL's policies. My 12-year-old daughter is also struggling with wanting to go to school. This is very difficult for my children to understand and handle."

These are good people, Your Honor. They are hard-working people, people who are doing their best to take care of their families and raise their families, and people who believe that they are following God's word and God's commands. And the Labs recognizes that they have a sincere religious belief that prevents them from taking this vaccine.

At the end of the day, this Court, as all courts, has the power and authority to help these people honor their convictions and to protect their consciences

and to set a strong and powerful example for their children and their neighbors. At the end of the day, this Court will, hopefully, restore some common sense to a situation the COVID pandemic that has, in my humble opinion, for too long been ruled by fear and chaos and confusion and mandates and dictates and an increasing loss of freedom and liberty, and I would respectfully ask that the Court help to turn that tide.

It's time to return to the promise of this country as a place where everyone is free -- free to worship God as they wish; free to speak what is on their mind, even or especially when others disagree; free to decide how best to take care of themselves and their own families; and free to make their own choices when it comes to their own health and safety.

We respectfully ask that the Court grant our motion, issuing a temporary restraining order, and, if appropriate, a preliminary injunction to help these people preserve their lives and the lives of their families until this matter can come to a completion.

And that concludes my presentation, Your Honor. I'd be happy to answer any questions the Court may have.

THE COURT: Thank you, Mr. Artuso. The Court certainly understands the anxiety that all of these

families and employers and employees are facing as these decisions are being made, and the Court takes its responsibility to uphold the rule of law extremely seriously.

That being said, I do have just a few brief questions for you before I turn it over to the defense.

Regarding injunctive relief, the pay status of the plaintiffs, it appears that six might be on paid leave, and two are on leave without pay. Is that correct, Mr. Artuso?

MR. ARTUSO: I am not certain of that, Your Honor. I do know that when we filed our petition, or our complaint and our motion, that all of them had vacation time. I do know that a couple of them may have had very short vacation time.

THE COURT: Okay. That being said, the Court does recognize that the arbitration issue is a threshold issue the Court is going to have to deal with before moving any further. Should the Court decide that it was appropriate to issue the injunctive relief in this matter, the purpose of the injunctive relief is to maintain the status quo.

Based on your arguments earlier, what are you envisioning the status quo to be? Would that be for them to maintain payroll status, even if they're out of

vacation days and benefits? Or go back to work? What are you envisioning the status quo to be?

MR. ARTUSO: I believe that the status quo, Your Honor, should be to go back to work. But certainly maintaining pay while on vacation status, if that's what the defendants would prefer, would also be acceptable.

As I pointed out during my argument, in the O Centro case, the Tenth Circuit case decided en banc back in 2004, they define the status quo as "the last peaceable uncontested status existing between the parties before the dispute developed."

Now, the dispute obviously developed when the Labs announced back in September that the only accommodation would be leave without pay. At that point in time, the last peaceable uncontested status was that all of the plaintiffs were working.

THE COURT: All right. Thank you. That answers my question, Mr. Artuso.

With that being said, I believe it's time to move on. Ms. Sanchez, would you like to present on behalf of the defense?

MS. SANCHEZ: Thank you, Your Honor. I think my colleague, Mr. Weil, will be presenting.

THE COURT: Thank you. Mr. Weil?

MR. WEIL: Thank you, Your Honor. There are two motions before the Court, and absent objection from the Court, I would like my colleague, Mr. Wallace, to handle the motion to compel arbitration, while I focus my arguments on the motion for temporary restraining order and preliminary injunction.

THE COURT: All right. So would you like for Mr. Wallace to start regarding arbitration?

MR. WEIL: Yes, Your Honor.

THE COURT: All right. Mr. Wallace?

MR. WALLACE: Thank you, Your Honor. May it please the Court.

In their motion for temporary restraining order and preliminary injunction, plaintiffs are asking the Court to require Triad to effectively reinstate them, and hundreds of other employees who have been placed on leave, to active employment pending a trial on the merits.

While defendants Triad and Dr. Thomas Mason maintain that plaintiffs are not entitled to the injunctive relief they seek, the Court need not even reach that issue today. This is so for three reasons.

First. Plaintiffs each signed and agreed to be bound by an arbitration agreement, binding them to submit all claims, both arising out of or related to

their employment, to arbitration, and "waived the right to take any such dispute to court."

The arbitration provision is broad, and it contains no carve-out for either party to seek injunctive relief in this Court. In fact, the arbitration provision expressly provides that the arbitrator has the express right to issue all remedies that a court of law can issue.

Third. While some courts have allowed litigants to pursue injunctive relief prior to arbitration, they have only done so to preserve the meaningfulness of the arbitration process and to ensure it is not a hollow formality, which is not the case here, where plaintiffs are seeking a mandatory injunction, seeking to be returned to work. This is not a request for injunctive relief in aid of arbitration. It's a request for injunctive relief in lieu of arbitration. And for that reason, it must be rejected.

As has been alluded to several times this morning, Triad manages and operates Los Alamos National Laboratory under a contract with Department of Energy's National Nuclear Security Administration.

Triad's contract became effective on November 1, 2018. Prior to that time, the Lab was operated by Los Alamos National Security, L.L.C. As

part of the transition from Los Alamos National Security to Triad, Triad offered new jobs to certain of the LANS employees, including five of the eight plaintiffs here. The offer of employment came with an offer letter, an offer acceptance letter, and a document called an At-Will Employment, Invention Assignment, and Confidentiality Agreement that contained the arbitration provision at issue.

Each of these employees, these five employees, were required to sign those documents to accept employment with Triad and become Triad employees. All five did. The three other plaintiffs in this case were subsequently hired after Triad had the contract to operate the Lab, and all three of those employees, it's uncontested, signed the same documentation, or substantively the same documentation, containing a substantively identical arbitration provision.

So as a starting point, Triad has established, through its papers and otherwise, all of the familiar elements of contract formation of New Mexico law. First there was an offer. Each received an offer letter, an offer acceptance letter, and the arbitration agreement and the employment contract; and each one of them signed it, and there's no dispute to that. So we have offer, acceptance.

As for consideration, plaintiffs spent considerable time in their briefing and this morning talking about the fact that essentially an at-will employee can't enter into an enforceable arbitration agreement because, I suppose, it's not supported by consideration. I'll talk about that in a minute.

But to shortcut the argument, the fact of the matter is, the arbitration agreement is mutual. It requires both parties to submit all claims arising out of or related to their employment, plaintiffs' employment, to arbitration. That constitutes adequate consideration ten times out of ten.

To this end, I direct the Court to an opinion in the case of Clark v. Unitedhealth Group, 2018, Westlaw, 2932735. In that case, the magistrate judge was grappling with this concept of whether the offer of employment would constitute adequate consideration. There's some question as to whether, if it's an offer on the front end as opposed to an offer in midstream employment, it's adequate consideration.

The Court in that case, after grappling with that issue, said, "This is not to say that an at-will employment contract could never include an enforceable arbitration agreement. Rather, at-will relationships are subject to arbitration agreements whenever another

form of consideration supports the employment agreement. Clearly such consideration exists when the parties mutually agree to arbitrate their disputes in valid and enforceable arbitration agreements - in other words, arbitration agreements not dependent on the at-will employment relationship alone for consideration," are valid."

So even when courts grapple with those at-will issues, the conclusion, again, ten times out of ten, is that a mutual agreement to arbitrate constitutes adequate consideration.

That being said, Judge Browning has repeatedly held, as have others on this Court, including in the case of Parish v. Bolero Retail Holdings, 727 F.Supp. 2d 1266: The Court believes that plaintiff takes New Mexico contract law too far. According to -- and I'm using "plaintiff" in terms of the name, the plaintiff's name -- at-will employment contracts in New Mexico could never include arbitration agreements because the offer of at-will employment is not a sufficient promise to constitute consideration. The Court has found no New Mexico case law, nor has Parish -- the plaintiff -- provided the Court with any case law that has found any at-will employment is insufficient consideration for a contract. The Supreme Court of New Mexico, rather,

seems to accept that a contract for at-will employment, even an implied contract, for the consideration is the offer of employment, is valid.

So whether the Court finds that there is adequate consideration by virtue of the fact that the arbitration provision is unquestionably mutual, or it finds it by virtue of the fact that they were offered at-will employment in exchange for signing the contract, adequate consideration exists.

Which takes us to the last element of contract formation, mutual assent. There doesn't appear to be any dispute that by virtue of signing the contracts and coming to work for the company, and also certifying, by virtue of signing the arbitration agreement, that they acknowledge that they've carefully read all the provisions of the agreement, understand them, and will willfully and faithfully comply with the agreement. The mutual assent issue seems to be resolved, as well, and all elements are therefore established.

Now, with all elements of contract formation established, oftentimes courts will next look to the issue of arbitrability, with the claims at issue are covered by the arbitration agreement.

One thing that plaintiffs' counsel did not address in his presentation this morning was the fact

that this arbitration agreement at issue incorporates the American Arbitration rules, the rules of the American Arbitration Association, the employment rules, which, through those rules, delegate the issue of arbitrability to the arbitrator. And as a result of that, almost every court to have decided the issue has found that the issue of arbitrability is therefore an issue for the arbitrator to decide because it has been expressly delegated. That is our position here. But despite that fact, there can be no question the claims at issue are covered. They all relate to the status of the plaintiffs' employment. Therefore, they all arise out of or relate to the plaintiffs' employment.

The cases that plaintiffs cite for the proposition that perhaps this broad contract doesn't cover the claims at issue are cases that arise in the labor context involving collective bargaining agreements, where it's unclear as to whether the collective bargaining agreement only covers claims or requires claims to be submitted that arise under the collective bargaining agreement, or do they also cover claims that may arise under statutes that are extra contractual, CBA. That's not an issue here, where all claims related to employment or the terms of the contract must be submitted to arbitration.

Plaintiffs' argument also ignores the fact that, "When the applicability of arbitration is in dispute, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." And that was a quote La Frontera Center, Inc. v. United Behavioral Health, Inc., 268 F.Supp. 3d 1167, District of New Mexico.

So when the Court decides to delegate the issue of arbitrability to the arbitrator or decides to address the issue head-on as to whether the plaintiffs are covered here, Triad has established the claims are covered.

As to the arbitration agreement, itself, and the request for injunctive relief today, the agreement is broad. Again, under the agreement, the arbitrator is authorized to provide all remedies that a Court could provide which would necessarily include injunctive relief.

These facts distinguish this case from the one Tenth Circuit case to have addressed an issue similar, that case being Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dutton, 844 F.2d 726. It's a Tenth Circuit case from 1988. Plaintiffs cited us this case in a letter they sent to Triad's counsel on October 10th of this year for the proposition that the Court had the ability

to hear their potential temporary injunction because an arbitration would be premature.

But in that case, the Court decided that it could issue injunctive relief based entirely on the fact that the arbitration agreement at issue allowed for the Court to do so. It expressly said: According to the Court, the parties consented to the issuance of a temporary restraining order or permanent injunction to prohibit the breach of any provision of a restrictive covenant agreement; and therefore, "plaintiff was entitled," under the employment contract, to the entry of orders protecting the status quo, the merits of the dispute with its former employer.

That's not the case here. Furthermore, that case is distinguishable on the facts because in that case, the Dutton case, the employer was moving to enjoin the employee because the employee was acting in potential violation of restrictive covenants agreement, had absconded with trade secrets, was soliciting potential clients. The Court found there's no way for the Court to put the toothpaste back in the tube. Once that individual goes out there and violates the contract and steals those clients for its new employer, there's no remedy that can be given to the employer at a trial on the merits at that point in time. That's not the

case here.

And, again, in cases where courts have held, all outside the Tenth Circuit, on these facts, that injunctive relief may be granted pending arbitration, they've only done so to preserve the meaningfulness of the arbitration process and ensure it is not a hollow formality. Further, when courts are exercising their authority outside of the Federal Arbitration Act to issue injunctive relief prior to compelling arbitration, they're exercising their equitable powers.

Here, the equities, as an initial matter, don't dictate that the Court should rule prior to compelling arbitration on plaintiffs' request for injunctive relief. That's primarily so because plaintiffs have known of their obligation to arbitrate for weeks, if not far longer. They didn't pursue their rights in arbitration. They had every right to do so. The contract provides for it. The contract absolutely 100 percent says the arbitrator has the ability to grant all remedies that a court would grant.

Instead, they lay in wait. They lay in wait because there was another filed lawsuit in the First District Court, a New Mexico State Court, to see what that court was going to do. And so they sent a letter to Triad two weeks prior to the hearing in that case,

and did nothing for two weeks. They didn't exercise their rights to go to arbitration, which they could have done.

The Court then issued a ruling, properly so, denying the plaintiffs' in that case request for injunctive relief and thereby allowing Triad's mandate to go into full effect, and resulting in a number of the plaintiffs, and the other individuals they seek to represent, to be placed on leave without pay.

They now come to this Court and say, "Well, Your Honor, enter our injunctive relief pending arbitration potentially." They're not even really saying that. They're just saying, "I don't have to go to arbitration because of enforceable arbitration laws, but grant me this injunctive relief."

There's no precedent that supports that proposition, especially under these facts, and given the fact that plaintiffs have waited on their rights to assert them, which they could have done weeks ago in arbitration.

Furthermore, granting the injunctive relief request does not preserve arbitration. Instead, it makes arbitration a hollow formality for Triad because forcing Triad to return individuals to active status or take any other number of actions, including reallocating

the work that has been subsequently reallocated, the costs and everything else associated with those things, there's no way to unwind that if Triad were to prevail at arbitration.

Again, that toothpaste can't go back in the tube. Triad can't get a judgment from an arbitrator that the money it expended and the resources it expended in the interim, litigating the case due to this injunction, are recoverable.

So it doesn't preserve the meaningfulness of the arbitration. It makes it a mere hollow formality. And for that reason, this case is distinguishable from all the other cases that have found that a court could stay, could issue injunctive relief, pending arbitration.

In closing, I want to address a few arguments that plaintiff raised this morning; namely, the class waiver issue. Plaintiffs seem to take the position that the inclusion of a class waiver, which does exist in the subject arbitration provision, somehow makes the provision unenforceable. That's not the law.

In Fiser v. Dell, the case that plaintiffs' counsel referenced, in 2008, the Court found that the class waiver in that case, which was a case involving consumer contracts, was unconscionable. It was

unconscionable because the only damages available to the plaintiffs in that case were a maximum of $10 to $20. And so the Court found that if it were to enforce the class waiver, there would be no right to redress for all of the individuals who were wronged by this potential policy, and a policy that violated the law protection.

The Court did not find class action waivers per se unenforceable. If it did, such a finding would be preempted by the Federal Arbitration Act as found by the United States Supreme Court in AT&T Mobility v. Concepcion, in 2001, which was two years subsequent to the Fiser case, where the Court said: When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward. Conflicting rule is displaced by the Federal Arbitration Act.

And subsequent to Fiser and AT&T, at least -- the New Mexico Supreme Court at least one time called into question Fiser and Felts v. CLK Management, 2012 Westlaw 12371462, but in doing so pointed out that there is no, again, per se rule that prohibits class action waivers. That analysis is whether the overall contract is unconscionable.

Here, there has been no allegation that the arbitration provision at issue is unconscionable in any

respect. Therefore, the class action waiver issue is not even properly preserved, and it's not properly presented.

Plaintiffs also raise in their briefing, though not discussed this morning, that the contract constitutes an adhesion contract. However, while Triad refutes the notion that its contract is an adhesion contract, New Mexico courts, including this Court, in Davis v. USA Nutra Labs, 303 F.Supp. 3d 1183, finds that: "Adhesion contracts, however, or take-it-or-leave-it contracts, have become the norm, and the disparity in bargaining power that results from these contracts is not considered sufficient to render them unconscionable." Instead, there must be some additional allegations of unconscionability, procedural unconscionability of some form, some high-pressure tactics or anything of the sort.

Again, no allegations have been raised related to any kind of unconscionability; and therefore, this adhesion contract argument also fails.

With all of that said, Your Honor, we respectfully request the Court compel arbitration and stay the proceedings in accordance with the arbitration agreement at issue and the applicable law and the Federal Arbitration Act.

THE COURT: Thank you, Mr. Wallace. Before I move on, I just have one question. You have filed your motion to compel arbitration. There was a response filed yesterday. Have you had an opportunity to review that?

MR. WALLACE: Yes, Your Honor.

THE COURT: Do you feel it necessary to file a reply, or do you feel that this matter has been sufficiently briefed for the Court to make a decision?

MR. WALLACE: I'm happy to file a reply. I think it has been sufficiently argued and briefed, but I'm happy to file a reply in short order if that would help the Court.

THE COURT: Do you feel that's necessary? I'm just asking you if you want that additional time?

MR. WALLACE: I'm happy to file a reply, Your Honor, yes.

THE COURT: All right. Thank you.

Now, Mr. Weil, would you like to proceed on behalf of argument on the TRO?

MR. WEIL: Yes, Your Honor. Thank you.

Before I address the merits of the TRO, there's a couple of threshold issues, one which was already addressed by my colleague, Mr. Wallace, that the plaintiffs' claims are subject to arbitration.

The second one is that two weeks ago, there was an order issued; two weeks and a day ago, there was a hearing in the State Court brought by plaintiffs on behalf of the same plaintiffs here. In that case, the plaintiffs were Triad employees who were bringing their action and their motion for preliminary injunction on behalf of all those similarly situated, which included the plaintiffs in this case.

At least one of the -- the plaintiffs in the case were both named as "Doe" plaintiffs. At least one of those plaintiffs in the Butters case was a plaintiff here, Adrianna Martinez.

Counsel referenced an e-mail that he sent me on this point; and so therefore, I think it's fair to read from that e-mail. He says, "Adrianna Martinez was initially a part of the group of plaintiffs and did provide an affidavit, but she did not sign a representation agreement with plaintiffs' counsel and subsequently told plaintiffs' counsel that she was withdrawing as a party in the case."

I don't know how somebody can withdraw as a party if they were never a party in the first place, and certainly signing a representation agreement with counsel is not the measure of whether someone was a party in that case.

There is at least one party in this case, if not more, that were parties to a State Court action, Your Honor. It is rare that plaintiffs -- to find authority where plaintiffs in a State Court action failed to obtain preliminary injunction and then run to a Federal Court to try again. But that is what has happened here, Your Honor.

In Taylor v. Sturgell, the Supreme Court identified a number of circumstances -- and that cite is 553 U.S. 880. The Court identified a number of circumstances in which plaintiffs who were not formally parties in the action can nonetheless be precluded by a prior action, and one of those is where the party litigating the second action is a proxy for the original plaintiffs.

Here, we know at least one of those plaintiffs was one of the plaintiffs. And certainly given the timing of what has occurred here, we know that she has to be, and these plaintiffs are a proxy. The timing is such that the Lab received a letter from these groups of plaintiffs' counsel on October 11th.

On October 13th the Lab responded, asking the plaintiffs' counsel to identify the plaintiffs in this case, and noted that the Butters case was in existence. There was no response immediately. On October 14th,

Judge Lidyard heard argument, after receiving evidence on the paper, and on October 15th he issued a lengthy order from the bench denying all relief.

In that case, the plaintiffs sought the same relief as in this case, or certainly could have sought the same relief that is being sought here, which means that they are precluded from trying again.

We know that there must have been a proxy because on October 18th, the plaintiffs in the Butters case suddenly dismissed their action with hopes of nullifying Judge Lidyard's order. And literally within hours, plaintiffs' counsel in this case sent another letter, making demands, but again not identifying his clients.

The Lab responded again a couple of days later and noted the fact that the Butters -- or Judge Lidyard had issued his order, and also noted the preclusive effect. Again asked for the identity of the plaintiffs, but none was to be had.

Plaintiffs insist that Triad needs to conduct an individualized inquiry of their requests for accommodation, but by staying anonymous before filing the suit, it made it impossible to do so.

Because of the similarities and that these plaintiffs are essentially acting as a proxy for the

Butters plaintiffs, this case has been decided, and the Court can deny and refuse preliminary injunction because of the obvious forum shopping that's happening here.

That's before the Court even gets to the merits of this case. I would like to turn to that now.

Your Honor, Triad did not issue its vaccine mandate arbitrarily or lightly or on a whim. It did not issue the requirement in response to any request or requirement by any federal or state government entity. It did so without the influence or direction from any outsider.

It did so to address a serious threat to its workers in its operations. It did so after it suffered massive losses of productivity, and even the lives of some of its employees. It did so after trying other things. Triad used masks, social distancing, and testing, but still suffered massive disruptions to its operations. Triad issued its vaccine requirement after trying to incentivize employees to become vaccinated, including through educational meetings and even raffling a truck. It issued its vaccine requirement after asking its own experts involved in medicine and data modeling to analyze whether a vaccine requirement would decrease risks to both the mission of the Lab and the health of its employees. The analysis revealed overwhelmingly

that it would.

Counsel suggested in his argument that Triad and the operations at the Labs seemed to work just fine -- I'm paraphrasing his argument -- using the other measures. Your Honor, I don't think the families of the five employees who died would agree. I don't think the families of the ten employees who can no longer work because of long-term consequences of COVID would agree that things were working just fine.

After careful thought about all of these issues and trying other measures, Triad decided to issue its vaccine requirement. It did so consistent with both state and federal law by providing medical and religious accommodations.

There were 293 religious accommodation requests versus 95 medical. And 267 religious requests were approved; three medical requests were approved for permanent exemption; and 24 extensions were given, but those employees too must be vaccinated within weeks.

There was an individualized analysis. Triad hired outside contractors to review each and every one of the religious accommodation requests. But the culmination of -- the accumulation, I should say, of requests, 293 with 267 approvals, cause burdens associated with the volume and create an undue hardship

to Triad, based on the volume, which the EEOC guidance confirms that Triad may consider in coming up with a reasonable accommodation. And that effective decision and judgment about what was reasonable for the religious accommodations and what would not constitute an undue hardship, given the nature of Triad's work, it requires in-person attendance. The plaintiffs will need to be on-site to conduct their duties.

For example, Adrianna Martinez is a research tech in the high explosive and science technology group. Among her responsibilities, she must be present on-site at Triad to set up experiments in explosive work. Your Honor, I don't know how she can do that from home. And certainly she doesn't say that in her declaration. Counsel says they all have been off-site and working from home. She doesn't say that. Neither does Isaac Martinez, who says -- whose duties include also running -- assembling explosive tests and running hazardous diagnostics. He can't do that from home, and he doesn't say he can.

In fact, Your Honor, counsel said that they've all been working from home, but we were able to pull the badge swipes from March 2020 through October 2021. Mr. Martinez, for example, was on-site 240 times, based on those badge swipes. Sam Sprow was on-site 263 times.

Based on the badge swipes, they've all been present on-site, so the idea that they can simply do their work from home or have just been doing their work from home is not supported by the evidence. It's not supported by their affidavits. It's not supported by Ms. Lambert, who admits in her affidavit -- and she is the one who is the receptionist -- that she currently works from home one day a week -- I assume she wrote that affidavit before she was put on leave -- confirming that she was working four days a week.

And even to the extent employees could perform some of their duties from home, Triad has mandatory and random drug tests that require employees to come on-site. There are other reasons each one of these employees needs to come on-site.

So the idea that they can simply work from home is not accurate.

The accommodation given to them was a leave of absence. Triad believes it's reasonable because it's not a termination per se. They're on a leave of absence. And all of the plaintiffs in this case are not just on vacation; they're on a leave of absence. They've turned in all of their equipment. Their duties have been reassigned by other employees who have covered for them.

The leave of absence doesn't create an undue burden, and employees are likely to get their jobs back when the pandemic subsides because there's a demand for employment. Triad is hiring. You know, there are openings. There's a big demand for work. And they can use their vacation pay.

Turning to the merits of the case, or the legal arguments, I should say, this is a mandatory injunction, Your Honor.

Counsel was very focused on the status quo, but that's not the only issue that affects the standard that the Court must consider. The Court must also consider whether this is a disfavored mandatory injunction, and there's no doubt it is, based on the relief that's being requested, which is they would have to -- the briefing from plaintiffs suggests they want reinstatement, restoration.

But the restoration would require them to be reinstated. It would require them to unravel -- it would require Triad to unravel all of its efforts to have their jobs covered.

That is a mandatory injunction, based on the cases -- based on and including the Tenth Circuit case Triad v. University of Colorado, 727 F.3d 1253, where the Court found that the relief requesting that the

plaintiff be reinstalled as chair of the Department of Medicine was a mandatory injunction. Based on that, the Court must apply a heightened scrutiny to the merits of the case, or to the claims being presented by the plaintiffs.

I also want to address one other procedural issue before I address the merits.

Based on the plaintiffs' briefing, the relief that they are seeking is on behalf of all employees who received a religious exemption, not just the named plaintiffs here. Your Honor, this was not a Rule 23 action, nor could it be because the plaintiffs all waived their rights to a Rule 23 action.

So a request on behalf of all employees is not proper or before the Court properly. It can only be done on behalf of these particular plaintiffs, again, who all have individualized issues. As I noted, they are not all working from home. They all have very individualized issues, so it's very -- the idea that the Court can issue a sweeping order on behalf of so many employees is not appropriate in this instance.

Next, I want to turn to the likelihood of success on the merits element. I first want to address plaintiffs' claims under Section 1983 of the constitutional law claims.

Your Honor, the Court need not grapple with whether Triad is a federal actor. The Court need not grapple with the merits of the constitutional claims. And the reason why is that plaintiff has not stated a valid 1983 action, cause of action against Triad. 1983 relates to state actors, not federal actors.

Counsel, in his argument, used the terminology very loosely. He sometimes referred to government actors, federal actors, state actors. But there are very important legal distinctions. The "government actor" term is the umbrella, but then you have federal actors and state actors. There is no 1983 -- this is hornbook law. You cannot state a 1983, Section 1983 action against a federal actor.

All of the arguments presented by counsel related to plaintiffs' contention that Triad is a federal actor, that it receives direction from the federal government, that it receives money from the federal government, and then counsel loosely says, "Well, it's a state actor," that's not how it works, Your Honor.

Counsel has argued that Triad is a federal actor, and because of that argument the Court could dismiss those claims on summary judgment now, because it's hornbook law that there is -- you cannot have a

Section 1983 action against a federal actor. The statutes -- the only statutes at issue or that would be relevant are the Title VII and ADA claims. But none of the constitutional claims have merit because of that threshold issue.

Triad is not a federal actor, even if the Court would go there. What counsel describes are facts that suggest that Triad is a federal contractor. But being a federal contractor does not make one a federal actor.

In the Brentwood, the U.S. Supreme Court case Brentwood that counsel refers to, which involved the sports association, in that case these public schools provided -- the organization was run by employees of the public schools, themselves. The record in that case suggested that board meetings were held during official school hours. In other words, the employees that were running the organization were employees of the public schools and conducting operations of the association during school hours. That's not the case here. Triad is a private employer and doesn't have a similar situation as the Brentwood case, with the membership and the identity of the employees. Simply having a federal contract and receiving money from the federal government does not make one a federal actor.

But again, Your Honor, this is not a federal actor. It is of no moment because plaintiffs cannot just state a Section 1983 action.

Plaintiff does not suggest or argue that Triad is actually a state actor. There is no evidence in the record about its association with any states, certainly, or that Triad was acting on behalf of the State of California, the State of Texas, or the State of New Mexico. There's no evidence in the record related to that. It is not a state actor; nor is Dr. Mason a government actor, either.

But if the Court were to turn to the constitutional law claims and still address those, which there is no reason to do so, given there is no valid 1983 claim, Triad's vaccine policy passes muster under the free exercise clause as well as the Fourteenth Amendment. It is a policy, a neutral policy of general applicability; and therefore, only a rational basis review applies. It is neutral because this policy applies to all Triad employees. It does not target religion.

Unlike the cases cited by plaintiffs, including the Lukumi case, 508 U.S. 520, and O Centro, a U.S. case, in both of those cases the policy targeted particular religions.

In this case, Triad's policy doesn't target any religion. It applies across the board. It's also generally applicable because it does not selectively burden religion, and the reason, because to be generally applicable, a law may not selectively burden religiously motivated conduct while exempting comparable secular motivated conduct. And it's the comparability is what's important here.

And as stated by Tandon v. Newsom, 141 Supreme Court 1294, comparability is construed with the risks various activities pose.

Those employees with medical exemptions have one due to medical necessity because they would literally be harmed by the vaccine if they take one. Those with medical necessities are not comparable to those seeking religious accommodations because particularly when one focuses on purpose of the policy, the purpose of the policy is to protect the health of the Triad's workers and to protect the operations of the Lab. Providing better accommodations for medical exemptions does not undermine these goals because requiring medically exempt employees to take the vaccine would harm them, which is not true of religious objectors. And there are substantially fewer medical exemptions than religious exemptions. There are three

permanent medical exemptions versus 267 religious exemptions.

Those are not comparable because one would -- in this instance, because allowing the religious exemptions to be on-site would undermine the purpose of the policy. But the medical exemptions, they would be harmed, themselves, by receiving the vaccine, which would be counter to the policy of protecting workers.

And this result is aligned with the result from Does 1-6 v. Mills, the First Circuit Court opinion cited in our papers. It does not yet have an "F," a Federal Reporter citation. But the Court -- in that instance, the State of Maine did not provide any religious exemptions, but did exempt on medical basis. In that opinion, the Court upheld or found that the vaccine requirement was subject to irrational basis review.

The proper comparatives here would be non-medical and non-religious objections to the vaccine, as compared to religious objections. But in this case, the plaintiffs here have been treated better because they're on a leave of absence and have not been terminated.

But even if the Court were to provide or were to apply strict scrutiny to the vaccine mandate, it

would survive that. And, again, this is not dissimilar to the decision in Does 1-6 v. Mills in the Mills case. Because Triad -- and the reason why it would survive strict scrutiny is because the policy is narrowly tailored.

Triad tried -- similar to what happened, the facts in the Mills case, where they tried other measures before going to vaccine mandate, Triad did that here. Same in the Mills case. They tried to incentivize employees to become vaccinated. Triad did that here. Those things didn't work; and therefore, only then did Mills, in the Mills case, did they go to a narrow -- a vaccine mandate, which the Court held was therefore narrowly tailored. In this case, too, Triad tried all these measures but came to the result of a vaccine mandate only after suffering loss or suffering disruptions to its operations and the health of its employees.

Turning to the Title VII claims, Your Honor, which are really the only valid claims that plaintiffs can bring in this case, given the federal actor issue, the 1983 issue, Title VII is clear that the plaintiffs are not entitled to the accommodation of their choosing. It just needs to be a reasonable accommodation. As I already alluded to, this is a reasonable accommodation.

They are not being -- they do not have to become vaccinated. They can take a leave of absence, and Triad will try to prioritize those employees. Later, when the pandemic reaches an appropriate level to have employees to return, Triad will prioritize those on leave over other candidates.

All Title VII requires is that -- or excuse me. I should say that Title VII does not require Triad to provide an accommodation that would impose an undue burden. And that standard is low. As long as it doesn't -- Triad is not required to provide an accommodation that would be more than a de minimis burden on them.

Certainly in this case, and in multiple cases that we've cited to the Court, allowing employees to come on-site and remain actively employed would create an undue burden and be more than a de minimis risk to the other employees in the operations. Triad is not obligated to provide the accommodation of plaintiffs' choosing or have to consider an indefinite number of accommodations.

It is also lawful to distinguish between medical and religious exemptions under a Title VII and the ADA. The Seventh Circuit case 94 F.3d 1041 at 1049 recognized that the difference between the -- the

standard between accommodations for Title VII versus ADA are different. We've cited to the Court other cases. We could have cited more cases to the Court, but we were limited by pages.

That issue is really not controversial. They are different standards. For providing a reasonable accommodation standard between the ADA and Title VII are different. ADA requires a much higher standard for accommodation. So the fact that there are differences is of no moment to the proper analysis.

With respect to the plaintiffs' ADA claims, plaintiffs seem to think or suggest or they argue that the fact that they once had COVID and now are recovered makes them covered by the disability statute. No court has held that, that someone who has recovered from an illness is now disabled and subject to the statute and covered by that statute.

And in any event, Dr. Pasqualoni evaluated all of the medical requests and applied CDC guidance to her determination as to whether someone should be exempted. She also consulted experts, and based on her review, her expertise of the CDC guidance, her consultation with experts, and her experience, she granted accommodations to those employees who had medical conditions that were contraindication to the vaccine, but did not grant as to

others because granting an accommodation as to others wouldn't be reasonable in those circumstances, to grant an accommodation where there is no -- where the condition at issue is not a contraindication to receiving a vaccine.

Your Honor, I would like to turn to the irreparable harm element, which is an extremely important one in this instance. Counsel has identified -- or plaintiffs have identified essentially two irreparable harms. One is a violation of their constitutional rights; and two, harm that would essentially arise from them being put on an unpaid leave.

With respect to the infringement of constitutional rights, as I mentioned, that's not even an issue here because the plaintiffs have not stated a 1983 action, a proper 1983 action, because they cannot have a 1983 action against a federal actor, which is all that the plaintiffs have argued here. Secondly, there haven't been any constitutional rights, federal. Triad is not a federal actor. Third, there have not been constitutional rights violations here.

So, really, what we're only looking at here are the irreparable harms or the alleged irreparable harms that might arise from plaintiffs being on unpaid

leave. But to have it be irreparable harm, first of all, the case law is clear from this circuit and all the others that loss of employment and the consequential damages that may result from loss of employment or loss of pay is not irreparable harm.

That is what all that has been described in the papers and in argument are the types of consequential damages, the compensable damages, that plaintiffs assert in just about every wrongful termination case in which damages experts come to testify about all the harms that have occurred such as -- you know, all the consequences of what happens because they lost insurance, they perhaps lost clearances, and the monetary damages that resulted from that. These are the types -- this is why we have wrongful termination claims. They exist so that a terminated -- they exist so a plaintiff who has been terminated improperly or unlawfully can receive monetary damages to compensate for all their employment loss.

In addition, irreparable harm cannot be speculative. Counsel described in his argument all of the things that might happen, may happen to the plaintiffs, such as what might happen to them if they lose their security clearances. That is speculative, and that is not a proper basis for irreparable harm.

Counsel also raised the TRO decision out of the Eastern District of Tennessee, and they cited the Sambrano case. Putting aside the merits of those cases, Your Honor, those are out-of-circuit cases that, respectfully, they were not applying irreparable harm standard appropriately.

But the procedural posture in those cases was very different from this case. In those cases, the vaccine mandate had not yet been effected. The employees had not already been put on a leave. In this case, the employees, the plaintiffs, have already been put on a leave.

And it's very -- the way that happened here is also very important to that issue, Your Honor. The letter -- certainly plaintiffs knew about the vaccine requirements since August of this year, and there were continually pronouncements and policies that have been put in the record, Q and A from the Lab through September.

Certainly during the September time frame, the plaintiffs could have filed this suit. They did file a different suit in late September, including one of the plaintiffs here. So certainly as of late September, they could have come to this Court and asked for the relief that they're seeking today, but they did not.

A letter was sent on October 11th. They could have come to this Court or could have filed an arbitration, and by now could have had a hearing before an arbitrator on this issue, but did not file, and waited to see what was going to happen in the Butters case before bringing this action more than a week after Judge Lidyard issued his decision denying the relief, and now come to this Court, where things have changed, the status of their employment has changed. They are no longer active. And they could have come here and sought a TRO from the Court when they were still active status, but did not, and waited until they're now on leave of absence, and it has been almost two weeks since they've been on leave of absence, but could have come here to this Court before.

That makes this case very different from the ones where courts have issued a TRO. Putting aside the merits of those TROs, the procedural posture are very different, and there is no basis to issue a TRO here, where the conduct that -- where the request is to preserve the status quo or to freeze the parties in place, the events have changed, where they're now on leave of absence, where now their duties have been reassigned and are covered by someone else, their badges and computers are no longer with them.

There's no irreparable harm that would accrue if the Court granted a TRO in this instance. Given that, and given the fact that, as a matter of law, plaintiffs have not stated a viable irreparable harm recognized. So even if the Court was inclined to sort of freeze the parties in place pending an arbitration, plaintiffs still have to satisfy that irreparable harm element, which has not been satisfied in this instance.

THE COURT: Thank you, counsel. We only have a few minutes left. If you have a few brief comments before the Court makes comments?

MR. WEIL: I would just -- thank you, Your Honor. I was almost done.

And based on the balance of the hardships in this case, Your Honor, it certainly would be more of a hardship not only just to the Lab if employees were allowed to continue to work unvaccinated, but also the other employees at the Lab who could be exposed to them.

And based on all of the elements that are required for preliminary injunction, plaintiff hasn't satisfied any of them to get either a TRO or a preliminary injunction.

With that, Your Honor, I'll wrap up.

THE COURT: Thank you, counsel. And thank you, counsel, for being observant of the time restraints

that we had today.

I'm not going to issue a ruling today. I'm going to allow counsel for the defendant to file a reply to the response and the motion to compel arbitration. I'm going to give you an abbreviated deadline.

Mr. Wallace, can you make November 5th? That is next Friday. Are you able to make that deadline for your reply?

MR. WALLACE: Yes, Your Honor. Thank you.

THE COURT: All right. Counsel, I appreciate everything that you all, Mr. Artuso on behalf of the plaintiffs and counsel for the defendants, have put before the Court. You have made this very well briefed and given the Court a lot of information.

I look forward, Mr. Wallace, to your reply brief by next Friday, November 5th, and then the Court will issue a ruling after that time.

Anything further, Mr. Artuso, on behalf of the plaintiffs?

MR. ARTUSO: Nothing further. Well, actually, Your Honor, just a quick question. Would the Court care to be informed of any decisions from other districts? These cases are sort of pending all over, and our finger may be on the pulse of those. So I just don't know what the Court's preference would be with respect to that.

THE COURT: If you feel it's applicable, I'll be happy to consider it or to be informed of it. You should notify defense counsel of it, obviously, before you provide that to the Court.

MR. ARTUSO: Yes, ma'am.

MR. WEIL: And, Your Honor, I assume that goes both ways, for both parties? Because I'll submit that I think if you put those decisions on a scale, the ones that favor us are a lot heavier.

THE COURT: Absolutely, counsel. And, again, if you would provide it to Mr. Artuso on behalf of the plaintiffs before you provide it to the Court. I appreciate it, counsel. We will look forward to further briefing.

We'll be in recess regarding this matter. Have a good weekend.

MR. WEIL: Thank you, Your Honor.

MR. ARTUSO: Thank you, Your Honor.

(Proceedings concluded at 11:30 a.m.)

UNITED STATES OF AMERICA

DISTRICT OF NEW MEXICO

CERTIFICATE OF OFFICIAL REPORTER

I, Julie Goehl, RDR, CRR, RPR, RMR, New Mexico CCR #95, Federal Official Realtime Court Reporter, in and for the United States District Court for the District of New Mexico, do hereby certify that pursuant to Section 753, Title 28, United States Code, that the foregoing is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Dated this 2nd day of November, 2021.

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